United States Court of Appeals

for the Second Circuit

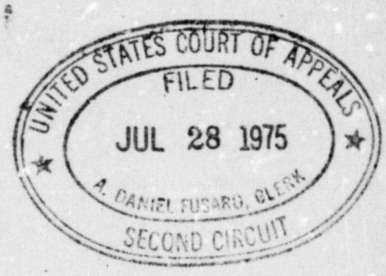
APPELLANT'S BRIEF & APPENDIX

75-2093

In The

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT



NO. 75-2093

APPEAL

from the

UNITED STATES DISTRICT COURT

for the

DISTRICT OF CONNECTICUT

B

P/S

NOWELL BRATHWAITE,

-APPELLANT,

vs.

JOHN MANSON,

-APPELLEE.

APPELLANT'S BRIEF AND APPENDIX

Submitted by:

MARTHA STONE
DAVID GOLUB
1800 Asylum Avenue
West Hartford, Connecticut

ATTORNEYS FOR THE APPELLANT

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TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

Case Citations:

II. ISSUES PRESENTED.

A. WAS TESTIMONY CONCERNING AN OUT-OF-COURT PHOTOGRAPHIC IDENTIFICATION IMPROPERLY ADMITTED INTO EVIDENCE AT TRIAL?

B. WAS TESTIMONY CONCERNING AN IN-COURT IDENTIFICATION IMPORPERLY ADMITTED INTO EVIDENCE AT TRIAL?

III. STATEMENT OF THE CASE.

A. HISTORY OF THE PROCEEDINGS

The petitioner-appellant Nowell Brathwaite was found guilty of possession and sale of heroin after a jury trial in Connecticut Superior Court in Hartford, Connecticut on January 14, 1971. He was sentenced on February 5, 1971 to a term of imprisonment of not less than six months nor more than nine years. Thereafter, he perfected a timely appeal to the Connecticut Supreme Court, which affirmed his conviction on April 5, 1973. State v. Brathwaite, 164 Conn. 617 (1973) [Appendix, Exhibit 2, p.A10]. Brathwaite subsequently filed a petition for a writ of habeas corpus in the United States District Court in Hartford, alleging the erroneous admission of identification testimony at his trial had violated his rights of due process. The petition was dismissed by the district court, Blumenfeld, J., in a written opinion [App., Ex. 1, p.A1] filed on May 14, 1975.

Notice of appeal was filed on May 22, 1975.

B. STATEMENT OF THE FACTS

On May 5, 1970, at 7:45 p.m., police undercover agent James Glover and his informant Henry Brown went to an apartment building at 201 Westland Avenue, Hartford [Transcript, pp. 24, 25], for the purpose of purchasing narcotics from "Dickie Boy" Cicero, a known narcotics dealer who lived in an apartment on the left side of the third floor [T., p. 45]. Glover and Brown entered the premises, observed by back-up officers Michael D'Onofrio and William Gaffey, but by mistake went to an apartment on the right side of the third floor [T., pp. 26, 85].

Glover and Brown described the ensuing events in the building differently.

Glover testified that he knocked on the apartment door and that in response the door was opened twelve to eighteen inches, revealing an unknown black male and female. Glover then asked the man for two bags of heroin, which the man agreed to sell him [T., p. 29]. The door was closed amd remained shut for approximately three minutes, presumably while the heroin was procured in the apartment [T., p. 31]. The door was then reopened and an exchange took place with the same man followed by the door being

closed immediately thereafter [Id.]. Glover and Brown then departed the building, five to seven minutes after entering [T., p. 33]. There was no artificial light in the hallway, although some natural light came in through the windows that evening.

Brown testified that the exchange had taken place with a black woman, not with a black man [T., p. 87].

After the transaction was completed, Glover and Brown left the building. At 7:53 p.m., eight minutes after their initial arrival outside the premises, Glover radioed Gaffey that the transaction had been completed [T., p. 11]. Glover then drove to police headquarters where he gave a description of the seller to D'Onofrio [T., p. 36]. Neither Glover nor D'Onofrio knew the identity of the seller at this time.

That evening D'Onofrio proceeded to the Records Division of the Hartford Police Department and secured one photograph of Brathwaite to show Glover [T., pp. 65, 70]. Although neither Glover nor D'Onofrio knew Brathwaite, and although D'Onofrio was furnished with only a general description of the seller, only one photograph of Brathwaite was selected by D'Onofrio from the extensive police files for viewing by Glover [T., p. 41]. The picture had been taken of Brathwaite in connection with a breach of the

peace [T., p. 70].

Two days later, Glover looked at the isolated photograph of Brathwaite and identified Brathwaite as the person from whom he had purchased the heroin [T., p. 38]. No explanation could be given for the absence of a full photographic array or line-up proceeding, although D'Onofrio did testify that a photgraphic show-up is not an unusual procedure [T., p. 71].

At the trial, the only evidence linking Brathwaite to the crime was the photographic identification made by Glover on May 7, 1970, and an in-court identification made by Glover during trial on January 8, 1971. In the eight months between the crime and the trial, Glover had no occasion to see Brathwaite [T., p. 41].

Brathwaite testified that he had been ill at home on the day in question [T., p. 106]. His wife, Eleanor Mae Brathwaite, confirmed that Brathwaite had in fact remained home that day with her [T., p. 165]. Dr. Wesley Vietzke testified as to Brathwaite's medical condition at the time, corroborating Brathwaite's testimony [T., p. 131].

Brathwaite had immigrated to America in March, 1965,[1] and was a native of Barbados in the British West Indies [T., p. 99]. On May 5, 1970, Brathwaite was suffering from a facial tic [T., pp. 138-39].

1. Although the record before this Court does not so disclose, Brathwaite has a foreign accent.

IV. ARGUMENT: TESTIMONY AS TO GLOVER'S OUT-OF-COURT PHOTOGRAPHIC IDENTIFICATION OF BRATHWAITE WAS IMPROPERLY ADMITTED INTO EVIDENCE AT TRIAL.

The first issue raised in this appeal is whether Glover's testimony of his out-of-court photographic identification of Brathwaite was improperly admitted into evidence at trial.[2]

The circumstances of the photographic identification are fairly well-established. On the night of the sale, Glover gave D'Onofrio a general description of the seller. D'Onofrio then selected a photograph of Brathwaite from the extensive police files, although he did not know Brathwaite personally and there had been no indication at that time of Brathwaite's involvement in the crime. Two days later, Glover viewed the one photograph and identified Brathwaite as the seller. The photographic identification was subsequently described at trial.

The key to the identification -- and to the outcome

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2. Although Brathwaite's counsel failed to object to the identification testimony at trial, the district court found there had been no deliberate bypass of state procedures. Memorandum, A-4.

of the trial -- was the use of only one photograph by Glover at the time of his initial identification of Brathwaite. No justification for this procedure has ever been advanced by the State, nor does the State deny the inherent impermissible suggestiveness in such a practice.

Indeed, courts have universally condemned identification proceedings involving only one photograph. The viewing of a single photograph has quite properly been called "the most suggestive and therefore the most objectionable method of pretrial identification." Kimbrough v. Cox, 444 F.2d 8, 10 (4th. Cir. 1971). The Supreme Court has expressly criticized such a practice, Simmons v. United States, 390 U.S. 377, 383 (1968), and this circuit has consistently disapproved the procedure. United States ex rel. John v. Casscles, 489 F.2d 20 (2nd. Cir. 1973); United States ex rel. Gonzalez v. Zelker, 477 F.2d 797 (2nd. Cir. 1973), cert. den. 414 U.S. 924; United States v. Reid, _____ F.2d ____ (2nd. Cir. 1975) (Dkt. Nos.

74-2598, 74-2599, April 24, 1975). Other circuits are in clear accord: United States v. Workman, 470 F.2d 151 (4th. Cir. 1972); Workman v. Cardwell, 471 F.2d 909 (6th. Cir. 1972), cert. den. 412 U.S. 932; United States v. Fowler, 439 F.2d 133 (9th. Cir. 1971); United States v. Cook, 464 F.2d 251 (8th. Cir. 1972), cert. den. 409 U.S. 1011; Mason v. United States, 414 F.2d 1176 (D.C. Cir. 1969); Kimbrough v. Cox, supra.

Somewhat surprisingly, however, this inexcusable identification procedure is one that continues to recur. Only recently, this Court had occasion to label as "little short of incredible" an identification proceeding in which only photographs of the two suspects were shown to the victim-police officer. United States v. Reid, supra, at . The incredible, however, would appear to be commonplace in Hartford, where, as one witness testified in this case, photographic show-ups[3] are not unusual [T., p. 71].

The continued survival of photographic show-ups is in large part attributable to the Supreme Court's decision

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3. The term "photographic show-up" shall be used to describe the showing of only one photograph.

in Neil v. Biggers, 409 U.S. 188 (1972), which held that impermissible suggestiveness alone does not invalidate identification testimony; only when the suggestiveness creates a substantial likelihood of misidentification must the identification testimony be excluded.[4] 409 U.S. at 199. Although Biggers purported to affect only pre-Stovall [v. Denno, 388 U.S. 293 (1967)], Id., it has generally been held applicable to post-Stovall cases as well.

Biggers shifted the emphasis from suggestiveness to reliability, propounding a "totality of the circumstances" test to determine the degree of that reliability. The validity of this test is questionable, since, given the invariable myriad of assorted circumstances present in every case, a court will almost always be able to draw whatever conclusions it wishes as to reliability. Indeed, it is not unusual for two courts to draw opposite conclusions from the same circumstances, especially where the degree

4. The Court's inquiry under Biggers is thus two-pronged: first, whether the identification was impermissibly suggestive; and second, if so, whether under the totality of the circumstances it has such a tendency to give rise to a substantial likelihood of misidentification. Casscles, supra, at 23-4.

of suggestiveness and the independent evidence of guilt are equally substantial. Compare district and circuit court opinions in United States ex rel. Gonzalez v. Zelker, supra; United States ex rel. John v. Casscles, supra.

The impact of Biggers on photographic show-ups has been decisive. Prior to Biggers, a clear trend of cases invalidating identification testimony based on photographic show-ups had developed. Workman v. Cardwell, supra; Kimbrough v. Cox, supra; United States v. Workman, supra. These cases relied heavily on the undeniable suggestiveness inherent in such a proceeding, as well as the inexcusability of using only one photograph.

After Biggers, photographic show-ups have been criticized but upheld, as courts have continued to note the impermissible suggestiveness of the procedure, but have invariably managed to sustain the identification evidence as reliable. Gonzalez, supra; Casscles, supra; Reid, supra. Thus, absent the deterrent of exclusion, photographic show-ups proliferate.

The district court opinion in this case continues this unfortunate development in identification law. Although the district court recognized the absolutely inexcusable impermissible suggestiveness of the identification procedures employed in this case, Mem., A-7, the court refused to give content to its finding of suggestiveness.

Thus, in order to uphold the reliability of the identification, Glover's superficial description of the seller is given great weight, a momentary encounter under questionable conditions becomes "a fairly good opportunity to observe," and a two day delay prior to the photographic identification becomes insignificant (while an eight month delay prior to the in-court identification is disregarded). As shall be shown below, the district court's conclusions are open to grave challenge.

The district court's reliance on such conclusions would be of less moment were this a case with any independent evidence of Brathwaite's guilt, Gonzalez, supra, at 165;

Glover's identifications were, however, the sole evidence against Brathwaite. Mem.,A-2. This habeas corpus petition presents what Judge Friendly has called that "rare case" where the petitioner has consistently asserted his innocence, not only in this Court, but in the state court as well, where he exposed himself to a mandatory minimum sentence of five years by insisting on trial. The only evidence against Brathwaite derived from an impermissibly suggestive identification; the identification was directly refuted by the state's own "trustworthy" witness, Henry Brown, who denied Brathwaite's involvement in the crime; Brathwaite had an alibi and an alibi witness; Brathwaite had no apparent history of criminal behavior or drug association; the agent had admittedly gone to the wrong apartment and had no previous knowledge of Brathwaite.

The district court concluded that, under the totality of the circumstances, although the photographic identification was impermissibly suggestive, there was no substantial likelihood of misidentification. The appellant submits that this conclusion is based on a strained application of the tests announced in Biggers and a failure to give sufficient consideration to the inherent suggestiveness of the show-up proceeding itself.

Under Biggers, the reliability of an identification may be assessed in light of a number of factors;

> As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation and the length of time between the crime and confrontation.
>
> 409 U.S. at 199.

The appellant contends that by using the tests set forth in Biggers it is impossible to conclude the identification was reliable.

1. Glover Had A Limited Opportunity To View The Seller.

Contrary to the district court's holding, the trial transcript reveals that Glover had a limited opportunity to observe the seller. Glover's only glimpse of the seller came during the two short intervals the door was opened. The door was opened only twleve to eighteen inches [T., p.29], and there was no electric or other artificial lighting in

the hallway [T., p. 28] or apartment. Although there was natural light in the hallway, the transaction took at sunset that evening.

Most important, the district court was clearly in error in concluding that Glover's encounter with the seller lasted a few minutes. Indeed, the trial transcript reveals that Glover had, at the most, a matter of a few seconds to observe the seller.

Glover and Brown arrived outside the building at 7:45 p.m. [T., p. 10]. At 7:53 p.m., eight minutes later, Glover and Brown were again outside the building, having completed the transaction and radioing to Gaffey from Glover's car [Id.] D'Onofrio testified that "only three or four minutes" elapsed from the time Glover and Brown actually entered the building and their return to the street [T., p. 60], during which time they had climbed up and down three flights of stairs. Glover testified that he waited at the closed apartment door for approximately three minutes while the seller procured the heroin in the apartment [T., p. 31].

The door was opened the first time only long enough for three short sentences to be spoken [T., p. 30, 31]. The second time the door remained open only long enough for the exchange to occur and was then immediately closed [T., p. 32].

Given these undisputed facts, what the district court calculated to be a matter of minutes is more correctly only seconds. Glover therefore caught only a quick glimpse of the person with whom he conducted the sale under circumstances of poor lighting and limited view. Any other conclusion is clearly erroneous.

2. Glover's Attention Was Diverted At The Time Of The Transaction.

The lower court also gave inappropriate weight to the fact that the witness was a trained police officer, assuming therefore that Glover had paid close attention to the seller. The testimony of Glover directly undermines this conclusion. When the door opened the first time, Glover's

attention was directed to two individuals, not just one [T., p. 31]. During the actual transaction, Glover had to concentrate on the hands of the seller rather than his face [T., p, 32]. Moreover, the description furnished by Glover was not so detailed that it would have distinguished one black male from countless others.

3. Glover's Description Of The Seller Was Not Particularly Accurate.

Glover described the seller as black, approximately five feet, eleven inches tall, dark, heavy, with short black hair and high cheekbones. This description would easily fit countless black males in the Hartford area. Conspicuously absent is a general approximation of the seller's age as well as any indication of unusual scars or identifying characteristics. Indeed, although Brathwaite was suffering from a facial disorder [T., p. 138-9] on the day of the crime (as well as other physical disabilities),

and although Brathwaite is a native of Barbados who had only recently immigrated to the United States [T., p. 99], Glover failed to mention anything unusual about Brathwaite's facial appearance or foreign characteristics or accent.

In a display of classic circular reasoning, the district court concluded that the accuracy of Glover's description was established "by the fact that it allowed D'Onofrio to pick out a single photograph that was thereafter positively identified by Glover." Mem. A-9. Of course, the critical question is whether Glover's identification of the face in the picture was reliable to begin with.

4. The Photographic Identification Took Place Two Days After The Crime.

For no apparent reason, Glover waited two days before attempting to make a photographic identification from the picture supplied by D'Onofrio. Especially given the

brief glimpse Glover had had of the seller, the two day delay assumes great importance. Had Glover made the identification that very night, as apparently was possible, the reliability of his identification would be greater.

5. The Record Does Not Reveal That Glover Was Particularly Certain Of His Photographic Identification.

The record does not reveal that Glover was particularly certain of his photographic identification.

Contrary to the district court's conclusions, it is therefore clear that Glover had a limited opportunity to view the seller, that Glover's attention was diverted by the woman at the apartment door, that the accuracy of Glover's description was not established by the State and the description was not particularly detailed, that there is no indication that Glover was particularly certain of

his identification, and that an unnecessary delay of two days elapsed before the photographic identification (with no physical identification until the time of trial, eight months later).

Thus, applying the factors suggested by the Supreme Court in Biggers to a reading of the trial transcript, it is clear that the impermissible suggestiveness of the photographic show-up resulted in a substantial likelihood of misidentification.

The appellant, however, does not rest solely upon those factors elucidated in Biggers to support his contention that the photographic identification was improperly admitted at trial. In Simmons, the Supreme Court urged that each case should be considered on its own facts, and the factors suggested in Biggers merely serve as a guide for a determination of the validity of an identification and are not meant to be all-inclusive:

> An examination of the totality of the circumstances necessarily means that the entire trial must be scrutinized to see whether on balance the petitioner received a fair hearing.
>
> United States ex rel. Springle v. Follette, 435 F2d 1380 (2d Cir. 1970)

See also United States ex rel. Gonzalez v. Zelker, supra, at 804, and United States v. Bynum, 485 E2d 490 (2nd Cir. 1973), vacated on other grounds 417 U.S. 903 (1974).

Among the evidence adduced at trial to consider when determining whether there was a substantial likelihood of misidentification is the extent of cross-examination of the eyewitness conducted by defense counsel. Simmons, supra, at 384. This circuit has consistently held that it is of crucial importance that all facts concerning any possible misidentification are elicited from the witnesses and placed before the jury. Casscles, supra, at 26; U.S. ex rel. Gonzalez v. Zelker, supra, at 801. In the recent case of United States v. Yanishefsky, 500 F2d 1327, 1331 (2d Cir. 1974) this Court again expressed its belief that extensive cross-examination is necessary to insure against the dangers of misidentification.

In the instant case, the cross-examination of Glover,

the only eyewitness whose testimony linked the appellant to the crime, was clearly inadequate. The cross-examination of the eyewitness in Casscles totaled forty pages. Casscles, supra, at 26. In Gonzalez, the thorough cross-examination totaled one hundred pages. Gonzalez, supra, at 801. The cross-examination of Glover, on the contrary, accounts for only six pages of the entire transcript [T., p. 47-52], despite the fact that defense counsel did not have the benefit of any testimony elicited pretrial at a suppression hearing. Defense counsel failed to question Glover sufficiently to stress to the jury either the suggestiveness of the photographic identification or its effect on Glover's in-court identification.

There was no testimony concerning the circumstances surrounding his viewing of the one photograph, the conversations, if any, he had with D'Onofrio regarding the photo, how many times he saw the photo, who was present during these times, whether the perpetrator of the crime had any facial hair, distinguishable speech patterns, unusual body movements, how

long the confrontation took place, why Glover went to the third floor right apartment instead of left, how many arrests he had made subsequent to the date of the crime. Thus, not all evidence which would show a substantial likelihood of misidentification was placed before the jury.

This court has recently elaborated on a second important factor not included in Biggers which aids in determining if there was a substantial likelihood of misidentification:

> Rather the rule is this circuit is that other evidence connecting a defendant with the crime may be considered on the issue whether there was a substantial likelihood of misidentification.
>
> Reid, supra, at 3099.

On every occasion where a federal court has held that the illegal out-of-court identification procedure did not create a substantial likelihood of misidentification, it could point to additional evidence of guilt tying the defendant to the crime. In United States v. Bynum, supra,

physical evidence obtained from the defendant at a later date reduced the possibility that he was a victim of misidentification. In U.S. ex rel. Gonzalez v. Zelker, supra, the defendant was seen riding in an automobile which had been placed at the scene of the crime. See also United States ex rel. Cannon v. Montanye, 486 F2d 263,268 (2d Cir. 1973), cert. denied 416 U.S. 962 (1974) where the court remanded because the record was sparse as to significant factual issues; U.S. ex rel. Robinson v. Zelker, supra at 165 in which the court reversed and remanded for an evidentiary hearing by the Court below on the question of the existence of an independent source. In Haberstrom v. Montanye, 493 F2d 485 (2d Cir. 1974), fingerprints of the appellant had been found at the scene of the robbery and were subsequently introduced at trial. In Reid, supra, the discovery of appellant's glasses, fingerprints, and revolver furnished further evidence of his involvement.

In this case, no other evidence was introduced at the appellant's trial to support the tainted pre-trial

identification or the in-court identification by Glover. There were no fingerprints, admissions, or confessions which were admitted on behalf of the government, nor was there any other tangible or intangible evidence which corroborated Glover's testimony. On the contrary, the other evidence submitted by the government only undermined Glover's reliability. Henry Brown, the informant who accompanied Glover, testified the transaction was conducted with a woman and not a man as Glover indicated [T., p.87]. D'Onofrio, the surveillance officer testified that Glover and Brown were to go to the apartment of "Dickie Boy" Cicero, a known narcotics seller, on the left side of the building [T., p.55], and not the right side as Glover indicated.

The appellant submits that because there were no additional factors corroborating his guilt, and no lengthy cross-examination of Glover, substantial, the likelihood of misidentification is further supported.

Finally, it is to be noted that the photographic procedure employed in this case was completely unnecessary.

Countless photographs were available for an array, as was Brathwaite himself for a lineup. Although Simmons had clearly enunciated the law two years prior, photographic show-ups were not -- and are not today -- unusual.

The facts of this case thus require this Court to reverse Brathwaite's conviction, not only because the conviction was solely predicated on unreliable identification evidence, but as a deterrent to continued use of photographic show-up procedures.[5]

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[5] Because of the absence of any additional evidence supporting the guilt of the appellant, the admission of this invalid identification testimony was not harmless error. Chapman v. California, 386 U.S. 18 (1967); United States v. Workman, supra, at 153; Fowler, supra, at 134. Accordingly, the district's court's ruling must be reversed.

V. ARGUMENT: TESTIMONY AS TO GLOVER'S IN-COURT IDENTIFICATION OF BRATHWAITE WAS IMPROPERLY ADMITTED INTO EVIDENCE AT TRIAL.

At trial, Glover also made an in-court identification of Brathwaite as the seller. The appellant contends that this identification was irreparably tainted by the prior impermissibly suggestive photographic identification and was erroneously admitted into evidence.

Once an out-of-court identification is determined to be invalid,[6] the burden shifts to the state to establish an independent source for a subsequent in-court identification. United States v. Wade, 388 U.S. 218, 240 (1967).

No such proof of an untainted source for the in-court identification is present in thi case.

Mnay of the factors discussed above with respect to the reliability of the out-of-court identification apply

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6. For the purposes of this argument, it is assumed that the Court will uphold the appellant's argument in Part IV, supra.

as well to an assessment of the reliability of the in-court identification, and need not be repeated at length here. Again, Glover had a limited opportunity to observe the seller under poor conditions, his attention was diverted, the accuracy of his description is not established and the description itself was not particularly detailed, cross-examination of Glover on his identification was insufficient, and no independent evidence of guilt is present on the record.

That Glover made a positive identification of Brathwaite at trial deserves little, if any, consideration. Brathwaite was the only person sitting next to the defense attorney at counsel table and quite naturally Glover's attention was focused there [T., p. 33]. More, important, however, because Glover was originally asked to concentrate on only one photograph, there was a great likelihood that he would retain an image of the photograph, rather than the image of the actual seller when he entered the courtroom at the trial. As the Supreme Court stated in Simmons:

> Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent line-up or courtroom identifications.
>
> 390 U.S. at 383.

Furthermore, the length of time between the transaction and the in-court identification severely undermines the reliability of the in-court identification. Although the offense took place on May 5, 1970, the trial did not commence until January 8, 1971, some eight months later. This circuit has recognized that such delay between the offense and the time of trial is of critical importance. In Reid, supra, at 3099, where the adverse effects of the delay were noted, the delay was less than three months; here, the delay is substantially greater. It is to be remembered that Glover testified that he had not seen the seller prior to the sale or subsequent to it until the time of courtroom identification [T., p. 41]. Thus, a strong likelihood that Glover was

simply remembering the image in the photograph when he made the courtroom identification exists.[7]

The trial transcript thus clearly reveals that the state has failed to establish an independent source for Glover's in-court identification of Brathwaite as the seller. Because the in-court identification was critical to the determination of guilt or innocence, and as a deterrent to future use of improper identification procedures, this Court should invalidate the courtroom identification and reverse Brathwaite's conviction.

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7. The transcript of Glover's testimony fails to indicated whether Glover viewed Brathwaite's photograph prior to testifying. If he had seen the photograph again, it would have an important bearing on the independence of Glover's recollection. Again, full cross-examination would have revealed this fact.

VI. CONCLUSION.

For the foregoing reasons, Glover's identification testimony was improperly admitted into evidence at trial. The district court's ruling must be reversed and appellant's writ of habeas corpus must be granted.

Respectfully submitted,

THE APPELLANT

BY: _____
MARTHA STONE
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W. Hartford, Connecticut

His Attorneys

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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NOWELL BRATHWAITE,

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APPELLANT'S APPENDIX

Submitted by:

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West Hartford, Connecticut

ATTORNEYS FOR THE APPELLANT

LIST OF EXHIBITS

EXHIBIT 1: DISTRICT COURT'S MEMORANDUM OF DECISION

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

NOWELL A. BRATHWAITE	:	
v.	:	CIVIL NO. H-74-209
JOHN MANSON, Commissioner of Correction of the State of Connecticut	:	

MEMORANDUM OF DECISION

The petitioner in this habeas corpus proceeding was convicted of possession and sale of heroin in Connecticut Superior Court on January 14, 1971. His conviction was upheld on appeal by the Connecticut Supreme Court. State v. Brathwaite, 164 Conn. 617 (1973). He is presently in the Connecticut Correctional Institution at Somers for a term of 6 to 10 years. He seeks relief in this court from his imprisonment pursuant to 28 U.S.C. § 2254 (1970).

Factually this case is quite simple. Leaving aside details for the moment, it may be summarized as follows: the State charged that an undercover police officer and informant went to an apartment in Hartford at about 7:45 p.m. on May 5, 1970. After they knocked on the door, it was opened 12 to 18 inches, revealing a man and, standing behind him, a woman. 1/

1/ The informant testified that only a woman appeared and that the deal was conducted with her. However, he also testified that he was using narcotics at the time and that his memory was generally fuzzy as to what happened when he was using narcotics. The jury evidently disbelieved his version of the transaction..

The officer asked the man for $20 of heroin and paid him that amount. The door closed, then opened again in a few moments, and the man gave the officer two glassine envelopes that were later shown by chemical analysis to contain heroin. The officer later identified the seller from a photograph and in court as Brathwaite. Brathwaite admitted that he knew the person who lived in the apartment where the transaction took place and had visited there.[2/] However, he testified that he had been home (i.e., at a different address) sick in bed all day on May 5. The defense presented medical testimony as to Brathwaite's ailments and the testimony of his wife that she had been at their home taking care of him throughout the day of May 5, 1970. The jury accepted the prosecution version and convicted.

The sole evidence tying Brathwaite to the possession and sale of the heroin consisted in his identifications by the police undercover agent, Jimmy Glover.[3/] Although no objection was raised to these identifications at trial, error in allowing them was claimed (unsuccessfully) on appeal.[4/]

2/ In fact, Brathwaite was arrested at that apartment on July 27, 1970.

3/ Cf. United States ex rel. Robinson v. Zelker, 468 F.2d 159, 165 (2d Cir. 1972), cert. denied, 411 U.S. 939 (1973) (where other evidence sufficiently supports conviction, allowing unconstitutional identifications into evidence can be harmless error).

4/ Because the point had not been raised at trial the appellate court applied a "plain error" rule, concluding that "[t]he

The asserted error also forms the basis for the present petition for habeas corpus. Thus there is presented the somewhat paradoxical situation where the state's contemporaneous-objection rule would constitute an adequate state ground precluding Supreme Court review, but leaves open to the plaintiff a habeas remedy in a lower federal court.[5/]

The first issue that must be addressed is the procedural one of whether the objections to the identification testimony may be raised here. The habeas statute, 28 U.S.C. § 2254(b) (1970), requires that a prerequisite to this proceeding is exhaustion of state remedies. As to the objections to the identifications, the raising of their propriety on appeal to the Connecticut Supreme Court is sufficient to exhaust Brathwaite's state remedies, even though his counsel

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4/ cont'd

defendant has not shown that substantial injustice resulted from the admission of this evidence." 164 Conn. at 619. It is not clear whether this rule was based on the merits or on procedural grounds or on some meshing of the two.

The Connecticut Supreme Court also considered and rejected claims that the trial court erred in refusing to set aside the jury's verdict because of insufficiency of the evidence and that it erred in several evidentiary rulings. None of these claims are raised here.

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> "[A] dismissal on the basis of an adequate state ground would not end this case; petitioner might still pursue vindication of his federal claim in a federal habeas corpus proceeding in which the procedural default will not alone preclude consideration of his claim, at least unless it is shown that petitioner deliberately bypassed the orderly procedure of the state courts. . . ." Henry v. Mississippi, 379 U.S. 443, 452 (1965).

failed to object to them at trial.[6] Cf. United States ex rel. DeNegris v. Menser, 247 F. Supp. 826 (D. Conn. 1965), aff'd, 360 F.2d 199 (2d Cir. 1966).[7]

The fact that there was no objection at trial raises the spectre of a deliberate bypass of state court procedures that might preclude asserting the objection here. Cf. Henry v. Mississippi, 379 U.S. 443, 451-452 (1965); Fay v. Noia, 372 U.S. 391, 438-439 (1963). However, unlike the exhaustion of state remedies, this issue is not a jurisdictional one that a court must raise sua sponte. Rather, it is a defense that may be raised and must be proved by the respondent. See United States ex rel. Cruz v. LaVallee, 448 F.2d 671 (2d Cir.

6/ The petitioner also raises a claim that he had ineffective assistance of counsel at his trial because there was no challenge made to Glover's identifications of him. Cf. Saltys v. Adams, 465 F.2d 1023 (2d Cir. 1972). However, a perusal of Brathwaite's brief on appeal indicates that this issue was not raised in the Connecticut Supreme Court. Nor has Brathwaite sought to raise this claim in a state habeas corpus proceeding, as he may properly do. Cf. Fredericks v. Reincke, 152 Conn. 501 (1965); Hodge v. Reincke, 25 Conn. Supp. 207 (Super. Ct.), appeal dismissed, 151 Conn. 736 (1964). Thus the exhaustion of state remedies required by 28 U.S.C. § 2254(b) (1970) has not occurred, and the claim of ineffective assistance of counsel will not be passed upon here. See, e.g., Bartee v. Robinson, Civ. No. H-74-312 (D. Conn. Oct. 8, 1974).

7/ In DeNegris I spoke of the "deliberate bypass" problem discussed in Fay v. Noia, 372 U.S. 391 (1963), as an element of exhaustion analysis. Courts since then have considered the deliberate bypass problem as an independent issue--analogous to waiver--which may prevent presentation of constitutional claims in habeas proceedings even if there has been exhaustion. See, e.g., Saltys v. Adams, 465 F.2d 1023 (2d Cir. 1972). Considering the latter approach better reasoned, I follow it here.

1971), cert. denied, 406 U.S. 958 (1972).[8] In this case the state has not contended that Brathwaite waived his right to challenge the identification testimony by the failure of his counsel to object to it at trial.[9] Thus the constitutional objection to its admission is properly before me for decision.[10]

8/ A more recent decision in this circuit, United States v. West, 494 F.2d 1314 (2d Cir.), cert. denied, 43 U.S.L.W. 3239 (U.S. Oct. 21, 1974), might be read as holding that the court should raise the issue sua sponte and place the burden on the petitioner to show that there was no deliberate bypass. However the procedural posture of that case was not entirely clear. For example, it is not clear whether a hearing was held on the issue of deliberate bypass in West. Cf. Humphrey v. Cady, 405 U.S. 504, 517 (1972). And it is possible, in reading the opinion, to conclude that the government had raised the issue in that case. Cruz is quite explicit by contrast. Absent any acknowledgment of Cruz or considered treatment of the issue in West, I do not read it as overruling Cruz.

9/ Indeed neither party addressed this issue, although specifically given leave by the court to brief the effect of the failure of Brathwaite's counsel to object to the admission of the identification evidence. Petitioner instead addressed the somewhat different issue of when a federal appellate court may consider an objection not made at trial. See, e.g., United States v. Rose, 500 F.2d 12, 17 (2d Cir. 1974). The respondent chose not to address the issue at all.

10/ The consideration of Brathwaite's constitutional point has been submitted to me by the parties for decision on the basis of the record and without a request for an independent factual hearing in this court. This procedure is permissible. The Connecticut Supreme Court's discussion of the evidence introduced at trial does not constitute "a determination after a hearing on the merits of a factual issue . . . evidenced by a written finding, written opinion, or other reliable and adequate written indicia," 28 U.S.C. § 2254(d) (1970); thus I am not bound by their view of the record. But neither does the case require a hearing on the facts underlying Glover's identification testimony, for they are not really in dispute. The question to answer is a legal one: do these facts give

The story behind these identifications is relatively uncomplicated. When Glover left the apartment at which he purchased the heroin he discussed what had occurred with a back-up officer outside, Detective D'Onofrio. He gave a description of the seller to D'Onofrio,[11/] who thought he recognized Brathwaite from what Glover told him. D'Onofrio obtained a picture of Brathwaite from police records and left it at Glover's office. Glover saw the photograph two days after the heroin purchase and identified it as a picture of the person from whom he had made the purchase. In court Glover asserted his positiveness that the photograph depicted the person who had sold him drugs. Glover also identified Brathwaite quite positively in court as the seller.[12/]

The standards for the constitutionality of identifications are by now fairly clear. The first inquiry is whether

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10/ cont'd

rise to a substantial likelihood of irreparable misidentification? Cf. Townsend v. Sain, 372 U.S. 293, 312 (1963) (emphasis added): "where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew."

11/ "I described the person as being a colored man, approximately five feet eleven inches tall, dark complexion, black hair, short Afro style, and having high cheekbones, and of heavy build. He was wearing at the time blue pants and a plaid shirt." Tr. 36-37.

12/ Glover testified that he had not seen Brathwaite between the time he identified the photograph and the time he saw him in court. Tr. 41.

the police used an impermissibly suggestive procedure in obtaining the out-of-court identification from the witness. If the answer is in the affirmative, the second inquiry is whether, under all the circumstances, that suggestive procedure gave rise to a substantial likelihood of irreparable misidentification, both when the photographic identification was made and when the in-court identification was made. See Neil v. Biggers, 409 U.S. 188, 196-200 (1972); Simmons v. United States, 390 U.S. 377, 384 (1968); United States ex rel. Cannon v. Montanye, 486 F.2d 263, 267-268 (2d Cir. 1973), cert. denied, 416 U.S. 962 (1974).

In this case Glover's initial identification of Brathwaite was made from a single photograph. There was no array of photographs and no line-up. In this circuit it is clear that this type of identification procedure is impermissibly suggestive. See United States v. Reid, Dkt. Nos. 74-2598, 74-2599 (2d Cir. Apr. 24, 1975); United States ex rel. John [Armstrong] v. Casscles, 489 F.2d 20, 24 (2d Cir. 1973), cert. denied, 416 U.S. 959 (1974); United States ex rel. Gonzalez v. Zelker, 477 F.2d 797, 801 (2d Cir.), cert. denied, 414 U.S. 924 (1973). Thus I pass to the second inquiry.

The Supreme Court in Neil v. Biggers, 409 U.S. 188, 199-200 (1972), spelled out the factors to be considered in determining whether there has arisen a substantial likelihood of irreparable misidentification:

> "As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. . . ."

Applying these factors to the instant case indicates that no substantial likelihood of irreparable misidentification exists here. Glover was within two feet of the seller, standing across the threshold of the apartment from him. The exact duration of the confrontation is unclear from the record, but it lasted at least a couple of minutes. Tr. 19, 29-33, 60. Although there was no artificial lighting in the hallway where Glover was standing, there was natural light coming through a window or skylight.[13/] Glover and the informant both testified that there was adequate light to see clearly in the hall. Tr. 28, 47. Thus Glover had a fairly good opportunity to observe the seller. Glover certainly was paying attention to identify the seller: he was a trained police officer who realized that he would later have to find and arrest the person with whom he was dealing. This conclusion is bolstered by the detailed nature of the description Glover gave his back-up officer, D'Onofrio.[14/] There is no

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13/ The incident occurred at about 7:45 p.m. on May 5, 1970. Glover testified that it was still daylight and that the day had been clear and sunny. Tr. 27.

14/ See note 11 supra..

direct evidence on the accuracy of this description, but its reliability is supported by the fact that it allowed D'Onofrio to pick out a single photograph that was thereafter positively identified by Glover. Only two days elapsed between the crime and Glover's photographic identification. Although another eight months passed before the in-court identification Glover had "no doubt in [his] mind whatsoever" that the defendant was the person who had sold him heroin. Tr. 34, 41-42.

The identification testimony was not unconstitutional. "So long as the prosecution can demonstrate that the witness had some opportunity to observe the offender at the time of the crime, the witness can make an in-court identification and can testify concerning the pretrial identification regardless of the suggestiveness of the pretrial proceedings." Pulaski, "Neil v. Biggers: The Supreme Court Dismantles the Wade Trilogy's Due Process Protection," 26 Stan. L. Rev. 1097, 1120 (1974). The petition is dismissed. It is

SO ORDERED.

Dated at Hartford, Connecticut, this 13th day of May, 1975.

M. Joseph Blumenfeld
United States District Judge

EXHIBIT 2: OPINION OF CONNECTICUT SUPREME COURT,
State v. Brathwaite, 164 Conn. 617 (1973)

A10

STATE OF CONNECTICUT *v.* NOWELL BRATHWAITE

HOUSE, C. J., SHAPIRO, LOISELLE, MACDONALD and BOGDANSKI, Js.

Argued March 8—decided April 5, 1973

Information in two counts charging the defendant with the crime of selling heroin and with possession of a quantity of a narcotic drug, brought to the Superior Court in Hartford County and tried to the jury before *Dannehy, J.;* verdict and judgment of guilty of both crimes, from which the defendant appealed. *No error.*

Noble K. Pierce, for the appellant (defendant).

Bernard D. Gaffney, assistant state's attorney, with whom, on the brief, was *John D. LaBelle,* state's attorney, for the appellee (state).

PER CURIAM. The defendant was charged with (1) sale of a narcotic drug and (2) possession of a narcotic drug. A jury found him guilty of both counts and the defendant has appealed, assigning as error the denial of his motion to set aside the verdict and two rulings on evidence.

The defendant's attack on the court's denial of his motion to set aside the verdict is considered by examining the evidence printed in the appendices to the briefs in order to determine whether the jury acted fairly, intelligently and reasonably in rendering its verdict. *State* v. *Mayell,* 163 Conn. 419, 421, 311 A.2d 60; *State* v. *Shelton,* 160 Conn. 360, 361, 278 A.2d 782.

From the evidence offered, the jury could reasonably have found the following facts. In May,

1970, Trooper Jimmy Glover of the Connecticut state police was assigned to the narcotics squad in an undercover capacity. On the evening of May 5, 1970, at about 7:45 p.m., he went with an informant to an apartment on the third floor of a building at 201 Westland Street, Hartford. There was natural light coming through the windows in the hallway and Glover had no difficulty seeing in the hallway. He knocked at the door of an apartment and when the door opened, he observed a male standing in front of a female. Trooper Glover asked the man for some narcotics. The door was closed and after a few moments the door was reopened and Glover purchased two glassine bags containing a white powder for $20 from the male. Although Glover did not know the seller at that time, he stood within two feet of the seller and was looking at his face for two or three minutes. Two police officers acting as covering officers observed Glover enter the building and when Glover met with them later that same evening he showed them what he had purchased. A subsequent report from the state laboratory disclosed that the white powder was heroin. When Glover described the seller to one of the officers, that officer recognized the description as that of the defendant and the next day left a photograph of the defendant at the state police headquarters for Glover to view. Glover made an in-court identification of the defendant as the person who had sold him the heroin. The defendant, who lives on Albany Avenue, Hartford, was arrested in July, 1970, at the apartment of Mrs. Virginia Ramsey, 201 Westland Street, Hartford.

The question presented by the defendant's claim that the court erred in refusing to set aside the verdict is whether the trial court abused its discre-

tion. *State* v. *Benton*, 161 Conn. 404, 409, 288 A.2d 411. On the evidence presented, the jury were amply justified in concluding that the state had proven beyond a reasonable doubt that the defendant had possession of and made a sale of heroin. *State* v. *Savage*, 161 Conn. 445, 452, 290 A.2d 221; *State* v. *Brown*, 161 Conn. 219, 222, 286 A.2d 304. The court was not in error in refusing to set aside the verdict.

The defendant claims that the court erred in permitting officer Glover to make an in-court identification of the defendant. The defendant asserts that the court should have determined whether evidence of Glover's observance of the defendant's photograph shortly after the sale was prejudicial before it allowed the in-court identification of the defendant. There was no objection or exception to the evidence when offered and this claim first appears in the defendant's brief. The defendant has not shown that substantial injustice resulted from the admission of this evidence. Unless substantial injustice is shown, a claim of error not made or passed on by the trial court will not be considered on appeal. *State* v. *Bausman*, 162 Conn. 308, 315, 294 A.2d 312; *State* v. *Fredericks*, 154 Conn. 68, 72, 221 A.2d 585.

The defendant, who had testified in his own behalf, assigns error in the court's overruling of his objections to questions asked of him and one of his witnesses by the state on cross-examination. Detailing the relevant evidence given prior to each question and the objections made would serve no useful purpose. A trial court has wide discretion as to the allowance of questions involving relevancy and remoteness and also as to the scope of cross-examination. *State* v. *Towles*, 155 Conn. 516, 523,

235 A.2d 639; *State* v. *Keating*, 151 Conn. 592, 597, 200 A.2d 724, cert. denied, sub nom. *Joseph* v. *Connecticut*, 379 U.S. 963, 85 S. Ct. 654, 13 L. Ed. 2d 557. The questions asked were proper and relevant to the matters raised by the defendant's own testimony.

There is no error.

State of Connecticut *v.* Raymond Beaulieu

House, C. J., Shapiro, Loiselle, MacDonald and Bogdanski, Js.

After a police officer chased an individual he had seen leaving a window at a country club into a brush area, it was sealed off. In an ensuing search of that area the only person found there was the defendant. Subsequently convicted of breaking and entering with criminal intent, he claimed that the trial court erred in not granting his oral motions for a bill of particulars which were made after the case was reached for trial and in not granting his motion in arrest of judgment which was made on the ground of insufficiency of the information. *Held:* Since the state's attorney read into the record a detailed statement of the facts claimed to constitute the crime charged and since the trial court summarized for the defendant the specific charges against him, he had sufficient information to prepare a proper defense without a bill of particulars.

The defendant's claim notwithstanding, the record and appendix failed to disclose any substantial disagreement between him and his court-appointed counsel over the "defense of the case." The difference of opinion between them concerning the proper procedure to follow in obtaining information which actually had been fully disclosed did not appear to diminish his attorney's ability effectively to defend him. To the extent that the defendant refused the services of his court-appointed counsel, his decision was knowingly and intelligently made. Thus, there was no constitutional defect in the trial court's denial of his last-minute request for a change of counsel.

The charge concerning "flight" as an admission by conduct was not erroneous since, on the basis of the entire charge, the jury could not have associated the principle concerning flight with the defendant unless it first determined, from the evidence, that he was the individual who had fled.

Argued March 7—decided April 6, 1973

EXHIBIT 3: DOCKET OF DISTRICT COURT PROCEEDINGS

CIVIL DOCKET

UNITED STATES DISTRICT COURT

M. JOSEPH BLUMFIELD

Jury demand date:

H 74 209

C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
NOWELL A. BRATHWAITE VS JOHN MANSON, Commissioner of Corrections of the State of Connecticut	For plaintiff: Pro Se Box 100 Somers, Conn. 06071 Martha Stone, Court Appt. UCONN School of Law 1800 Asylum St. West Hartford, Conn. For defendant: John D. LaBelle, State Atty 95 Washington St. Hartford, Conn.

STATISTICAL RECORD	COSTS		DATE 1974	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed	Clerk					
J.S. 6 mailed	Marshal					
Basis of Action: Petition for a writ of habeas corpus brought by a state inmate.	Docket fee					
	Witness fees					
Action arose at:	Depositions					

DATE	PROCEEDINGS	Date Order Judgment N
1974		
6-28	1. Petition for a writ of habeas corpus filed. Permission to proceed in forma pauperis GRANTED. Blumenfeld, J m7/2/74. ORDER TO SHOW CAUSE WHY A WRIT OF HABEAS CORPUS SHOULD NOT BE ISSUED. Blumenfeld, Jm 7/2/74. Attested copies of ORDER and copies of petition handed to Marshal for service upon Manson, State Attorney and Attorney General.	
7-5	2. Marshal's return showing service upon def.	
7-15	3. ORDER, appointing Martha Stone as Attorney for petitioner. Blumenfeld, J Copies mailed to petitioner, Atty Stone and Atty General.	
"	4. CJA 20 executed. Appointing Martha Stone to represent the petitioner. (Blumenfeld, J.)	
"	5. Appearance of John D. LaBelle entered for the defendant.	
"	6. Return of REspondent filed.	
1975		
2-27	7. Brief in Support of Petitioners Writ of Habeas Corpus., with exhibits.	
3-26	8. Brief of Respondent in Opposition to Writ of Habeas Corpus.	
4-22	9. Reply Brief in Support of petitioners writ of habeas corpus.	
5/13	10 Memorandum of Decision (MJB,J)(M 5/14/75)Copies to counsel	
5/21	11. JUDGMENT entered, Markowski, C. m 5-22-75. Copies mailed.	
5/22	12 Notice of Appeal filed. Motion to Proceed in Forma Pauperis ,GRANTED, Blumenfeld, J. m 5-22-75. Copies mailed to counsel of record. Attested copy of appeal and docket entries mailed to N.H. and U.S. Court of Appeals,(Forms C & D mailed to Atty Stone.)	

A True Copy
ATTEST:

SYLVESTER A. MARKOWSKI
Clerk, U. S. District Court

By: _____
Deputy Clerk

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed, postage pre-paid, to the State's Attorney's Office, 95 Washington Street, Hartford, Connecticut, this 25 day of July, 1975.

David S. Golub

DAVID S. GOLUB